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Review of “Lawyers for People of Moderate Means,” By Barlow F. Christensen

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of the individuals populating them. He deals not so much with Congress as with particularly dominant Senators and Congressmen, and his wealth of anecdotal material at various points of crisis makes the book a fascinating way to gather valuable perspectives.

The interplay between President Roosevelt and his backers and enemies in Congress and on the Court is superbly told with a pleasing taste for drama as well as accuracy. The force of the presidency is also clearly made a function of the force of Roosevelt, Truman, Eisenhower, Kennedy, Johnson, or Nixon as an individual. He confesses to a disagreement with Tolstoy's theory that history moves as a glacier, impervious to the actions or ideas of individuals and he documents his point of view well.

My conclusion is a wholehearted recommendation of the work. It ties together so many elements with such finesse and skill of editing that the whole is substantially greater than the sum of its parts. The book makes a genuine contribution for lawyer or layman.

JOHN F. DOBBYN*

LAWYERS FOR PEOPLE OF MODERATE MEANS. By Barlow F. Christensen. Chicago: American Bar Foundation, 1970. Pp. 313. \$6.95.

How's that again? "Lawyers for People of Moderate Means"? Is this book for real? I mean, isn't it silly to think of "lawyers" *for* "people of moderate means"? Lawyers are for the rich, who've got a choice, and for the poor, who haven't got a choice. Oh! It's put out by the American Bar Foundation—sounds like the American Bar Association. Must be about how us working folks are going to pay for a lawyer when we have to get one, like for a divorce, or to buy a house, or to get disability compensation or to go bankrupt. Of course, we don't have much choice—they've got us over a barrel. Yeah, I see. The title goes on: "some problems of availability of legal services." Availability? Hell, the phone book's full of them. Ah, well, there isn't much I can do about it anyway. If they want to be more available, let them. But if they think I'm going to want to hire them, they're wasting their time.

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I.

It is likely that the author of this book will be saved such a hip-shot review by some person of moderate means, for it is highly doubtful that even the softbound version will find its way into the revolving racks at the discount drugstore or the paperback section of a newstand. This is, of course, a book of, by and for lawyers; a series of essays,¹ crisp and concise; an encyclical to the profession from the germanic, or progressive, wing of the curia;² and a nearly current³ repository of all any practicing lawyer and local bar official needs to know about group legal services,⁴ lawyer referral systems,⁵ Neighborhood Law Offices⁶ and much else.⁷ Because the author takes a stand in favor of lawyers' specialization,⁸ relaxed rules governing the legitimacy of group legal

1. "This book is made up of papers written as part of . . . an American Bar Foundation research project . . . undertaken to provide the [American Bar Association Special Committee on Availability of Legal Services] with research support." B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* xiii (1970) [hereinafter cited as *LAWYERS*]. See also B. CHRISTENSEN, *BRINGING LAWYERS AND CLIENTS TOGETHER* (1968); B. CHRISTENSEN, *GROUP LEGAL SERVICES* (1967).

2. The longest section of *LAWYERS* is devoted to group legal services, on which the author takes substantially the same position as the ABA Special Committee on Availability of Legal Services, see note 1 *supra*, for the creation of ethical rules for the increase of group legal services. *LAWYERS* 283. The Special Committee's recommendations were rejected by the ABA House of Delegates in January, 1969, by passage of a motion to refer them back for further consideration in light of the Code of Professional Responsibility, then in draft form. 94 ABA REP. 138 (1969). The Code, as adopted by the House of Delegates in August, 1969, authorizes group legal services "only in those instances and to the extent that controlling constitutional interpretation at the time of rendition of the service requires the allowance of such legal services activities." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-103(d)(5). The Special Committee reported that this treatment of group legal services is "unsuitable and inadequate." 94 ABA REP. 694 (1969). One Special Committee member went further: "[F]inal and lifeless rest 'without possibility of parole' should have been the resulting fate of the concept that the legal profession can continue to sit selfishly on its dignified inertia in defiant default of the public's needs and escape corrective action prompted by public demand." Nahstoll, *Limitations on Group Legal Services Arrangements under the Code of Professional Responsibility, Dr 2-103(D)(5): Stale Wine in New Bottles*, 48 TEXAS L. REV. 334, 338 (1970).

3. The book cites to the Canons of Professional Ethics instead of the Code of Professional Responsibility, adopted by the ABA during its final preparation. *LAWYERS* xvii. As the author suggests, the differences are more formal than substantive. See note 2 *supra*.

4. *LAWYERS* 225-291.

5. *Id.* 173-224.

6. *Id.* 207-213.

7. For example, aids to the clients' meeting legal expenses, *id.* 58-80; specialization of practice, *id.* 82-127; and advertising and soliciting business, *id.* 128-172.

8. "There can be little real question about the social utility of specialization in law practice The attitudes and assumptions that prompt much of the resistance to the extension and improvement of specialization in law practice are not acceptable." *Id.* 126.

services⁹ and the correction of much professional myopia,¹⁰ the book is bound to be controversial. But, because it is in appearance professionally antitergiversational, the controversies will be insiders' concerns, analogous to such debates in other trade circles as whether or not airlines should serve extra drinks to passengers unexpectedly Havana-bound, or armor should have a greater role in the Indochina campaigns.

The author of this book, however, would have us believe that it serves a larger relevancy. In the course of asserting most serious concern for social crisis and the battered legal order, he takes to the stump in his opening pages:

Unfortunately, a movement toward rejection of the rule of law cannot be reversed merely by the mouthing of platitudes about how far the democratic system has come or by the proliferation of promises about what the system may in due time accomplish. . . . A point seems to have been reached in the nation's development, therefore, where those who still cherish the American dream have but one real alternative, and that perhaps for only a very little longer: *to make the democratic system really work to achieve genuine social justice for all Americans.*

Making the system work seems to a large degree to be a matter of relevance. . . .

The question of relevance has, or should have, special poignancy for lawyers, as failure to examine lawyers' functions against the background of today's problems and to adjust them accordingly is a sure path to professional obsolescence. . . .¹¹

With this overture, we might expect to learn whether and if so how lawyers' services are relevant to people of moderate means. But we do not. *There is no discussion at any place in the book of what lawyers do, or might do, to serve the interests of people of moderate means!* Instead, in closing after 295 pages of highly competent analysis of specialization, referral systems, special law offices, all kinds of group legal services, etc., etc., the author sprightly observes that "[t]his report has demonstrated one fact conclusively: No one really knows very much about lawyers and the legal profession."¹² As our mythical reviewer at the paperback rack might observe, only a lawyer could have the gall to pull a stunt like this.¹³

9. See note 2 *supra*.

10. See *LAWYERS* esp. 52-53, 79, 132-34, 142-46, 188, 195-96.

11. *Id.* 1-2.

12. *Id.* 296.

13. "In considering image, it might be well to keep in mind the possibility that the lawyer's view

The author manages the difficult alchemy of converting ignorance about lawyers into the relevance of their services by a series of narrowing definitions and incremental assumptions set forth in his first chapter, artfully entitled "The Problem in Perspective".¹⁴ First, the "modest study" shall be limited to the *availability* of legal services, according to the diffident assumption that "lawyers and the services they are able to provide have, and will continue to have, some relevance to *society's essential problems*."¹⁵ Second, the recipients of lawyers' services are limited to families with income between \$5,000 and \$15,000 per year,¹⁶ exclusive of "property and commercial clients", defined as "those who either operate some form of business enterprise or who possess sufficient money or property to have serious concern about finding ways of protecting it"¹⁷ and therefore to whom, it is assumed, the problems of distributing legal services for the most part have been solved. Third, representation in criminal matters and in "unpopular causes" is removed from consideration because each presents specialized problems of "availability".¹⁸ Finally, attention is concentrated on lawyer availability problems in urban and metropolitan areas, where the bar (and people of moderate means) is far more heterogeneous than in the small cities and towns in which have been set the traditional images of the people's practitioner.¹⁹

Having substantially reduced his scope (and its relevance), the author next explains why the "nature and seriousness" of the problems of middle-income people should not be examined. While they "are factors that help to determine demand for lawyers' services, they are factors *that are not easily altered* . . . [and] go primarily to the basic issue of the relevance of law, legal institutions and lawyers' services to the public's fundamental problems."²⁰ The first part of this puzzling statement seems to assume as a methodology that factors not within the investigator's power to influence should not be investigated, regardless

of himself is not necessarily the public's view [I]t is just possible that the profession's noncommercial tradition looms somewhat less large in the public mind than in the lawyer's." *Id.* 151.

14. *Id.* 1-39.

15. *Id.* 3 (emphasis added).

16. *Id.* 5 n. 4. These figures, based on 1963 income-population statistics should be raised to \$7,500 and \$20,000 to reflect the author's intention and today's figures. BUR. OF CENSUS, INCOME IN 1968 OF FAMILIES AND PERSONS IN THE UNITED STATES 19 (Ser. P-60, No. 66).

17. LAWYERS 4 n. 3.

18. *Id.* 4.

19. *Id.* 6, 293.

20. *Id.* 23 (emphasis added).

of their impact on the events and relationships studied. By analogy, physicians studying problems of medical services should not study the nature of disease and other ailments "because they are not easily altered" by physicians. Of course, the proposition that lawyers cannot alter—easily—the nature and seriousness of problems is itself curious inasmuch as lawyers do in large part determine what kinds of problems must or should have lawyers' services for their solution.²¹ The second part of the statement is equally self-serving; apparently, "fundamental problems" are also beyond the scope of the study because of their fundamentalness.

The reader is assured, however, that it is safe to assume that regardless of what problems the middle economic class may have, there is a "highly elastic demand" for lawyers' services:

Reason suggests, then, that the level of potential demand for lawyers' services is probably comparable in all segments of society, with only the nature of the problems different from one segment to another. Potential demand has already been largely translated into actual demand among property and business clients, by virtue of the ability of such clients to pay for the services offered by good lawyers and law firms. The offering of competent services without cost through legal aid and the newer federally financed legal service programs is likewise translating potential demand into actual demand among the poor. Is it not reasonable to believe that a largely untapped potential demand for lawyers' services similarly exists among people of moderate means, awaiting only the availability of services on acceptable terms to be translated into an actual demand of substantial proportions?²²

21. *Id.* 253-54.

22. *Id.* 25. The author supports this assumption by noting that the lawyer referral program "gives some hint of a vast potential demand for lawyers' services among people of moderate means." *Id.* 25 n. 11. As he later discusses, however, lawyer referral systems have not lived up to expectations because of the "bar's traditional conservatism and resistance to change," *id.* 202, and "lack of adequate critical study," *id.* 203. It is not known, for example, what kind of problems people bring through lawyer referral programs, *but cf.* P. STOLZ, THE LEGAL NEEDS OF THE PUBLIC—A SURVEY ANALYSIS 12 (Am. B. Foundation Res. Contribution 4, 1968) (in 1965, 42.5 percent of referrals concerned family law matters); how many persons served by referral systems would have contacted an attorney absent the service; to what extent the initial half-hour interview is the only result of the reference ("a substantial number . . . apparently," LAWYERS 190); and to what extent the lawyer referral device may provide a diagnostic or consultative service (at \$5 and up for the visit) that assures the client immediate answers to questions but the lawyers no opportunity for substantial and remunerative services. The author attempts to explain demand as a "'felt need"—a pressing lack of something perceived as essential *by the person who lacks it.*" LAWYERS 19. Because this definition suggests that the person so strenuously deprived would take action to neutralize the stress, it is concluded that failure to take such action means the person "is probably

Having thus relegated the problem of "lawyers for people of moderate means" to the familiar economics domain of supply-and-demand, the author is free to establish a simple framework of systems delivery analysis by which he organizes his investigations.

The product that the lawyer supplies is characterized in a variety of abstract desiccated ways, for example, remedial versus preventive services; counseling, drafting and representation; judicial, administrative, legislative, and arbitration and negotiation proceedings; and, most helpfully, "customized services" (limited to the skills of lawyers), standardized services (sometimes performed by non-lawyers, such as tax accountants) and nonprofessional services (not requiring legal competence but sometimes part of a lawyers' way of making a living).²³ The product is related to the "highly elastic demand" of middle income persons by four sets of factors determining availability: (1) quality of service offered, (2) cost to the client, (3) accessibility of the service, and (4) public knowledge and attitudes about law, lawyers and lawyers' services.²⁴

With this foundation to his case, the author finds that he has successfully traveled from social crisis and lawyers' relevance to consideration of what he really wants to write about. He is able to consider the price of legal services, specialization, group legal services and so on, according to how each affects supply and demand measured by the four criteria. He has only to add that in cases of conflict between the private interests of the supplying bar and the consuming interests of the public, the "public interests" shall prevail. "Public interest" is not defined, although the legal profession's prerogative to do so is jealously asserted.²⁵

unaware that he lacks . . . [something], does not know how to obtain it" or existentially concludes he does not really hurt, for example, because the cost of a lawyer's aid would result in a greater personal deprivation than letting his complaint go unattended. *Id.* This highly abstract psychological analysis of the potential client at best seems vulnerable to Occam's razor. Cf. note 21 *supra* and accompanying text.

23. LAWYERS 10-18.

24. *Id.* 23. For dissimilar use of the supply-and-demand model, see E. & J. Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966).

25. LAWYERS esp. 5, 136-37 n. 5, 147, 253-55, 293. "[A]lthough public interest may really require that a particular function be performed only by lawyers, a problem can arise in getting the public to accept this fact [T]o suggest that lawyers alone have the right to decide what services people will get, who will provide them, and on what terms, is not only unduly authoritarian but also somewhat naive. . . . The following attempt at classification [of the kinds of lawyers' functions] will be made . . . essentially from the profession's point of view, with the knowledge that the public will ultimately decide whether or not the classification makes sense." *Id.* 15 (emphasis added).

II.

Let us now explore what direction *Lawyers for People of Moderate Means* might have taken had the author seen fit to entertain some assumptions and their implications about the kinds of services which lawyers have provided people of moderate means in the past, and might provide in the future, "to make the democratic system really work to achieve genuine social justice for all Americans." Notwithstanding the lack of adequate empirical data based on validated information sampling techniques, there is a good deal of commonplace fact, unalterable or not, of which we may take layman's, if not lawyer's, notice. Some of it may even have a special poignancy in a relevancy-hyped society.

First, it is well known that there are matters routinely requiring lawyers' assistance which are common to all classes of people regardless of economic means. Major areas that immediately come to mind are divorce, separation, child support and other family concerns; criminal offenses of substantial consequences; major consumer debt problems suggestive of wage-earner plans and bankruptcy; personal injuries resulting especially in serious functional loss, disfigurement and loss of earning capacity; and (in many jurisdictions) the acquisition and transfer of real property. For the most part, lawyers who specialize in these matters, especially such un-propertyed causes as domestic relations and criminal law, have been denigrated by the leadership of the bar and the rhetoric of lawyers' aspirations.²⁶ Certainly, this kind of practice has been the objective of few lawyers and law students presented with other alternatives for practice.

Second, there is another, equally well recognized class of matters about which people of middle income may either consult attorneys or instead rely upon insurance salesmen, securities brokers, bank and trust company representatives, accountants, or on various do-it-yourself aids. These matters can be classified collectively as ways of maintaining, increasing, preserving, passing on and (sometimes) acquiring wealth, mostly property-wealth. They include wills, trusts and more elaborate estate plans for property sharing and transmittal, insurance mechanisms

26. *Id.* 7; but cf. *id.* 31-32. Compare Ladinsky, *Careers of Lawyers, Law Practice, and Legal Institutions*, 28 AM. SOC. REV. 45 (1963). While the author underscores the "marked heterogeneity, he fails to adequately and consistently take into account the differing perspectives and interests of the elite of the bar, who represent predominantly property and commercial clients, and the practitioners who deal mainly with people of moderate means. See notes 63-66 *infra* and accompanying text.

for protecting and building up wealth, and transactional and accounting schemes for minimizing governmental assessments. In this realm, the legal profession, especially through the efforts of rank-and-file practitioners not the grand-retainer elite, has sought to enhance its public service, to guard against usurpation of function by the "unauthorized practice" of non-lawyers (including non-lawyer specialists) and generally to improve its income-productive contacts by such public relations plans as the "Annual Legal Checkup".²⁷ Examination of the bar's internal discussions about the Annual Legal Checkup and external promotional materials incites the clear impression that the model client for such services is not a typical middle-income person, as here defined, but is a person of considerable acquired wealth, a small businessman, or at least someone who has withstood today's allures of consumptive hedonism in favor of Professor Banfield's model²⁸ of the future-directed man of property.²⁹ Above all, the sought-after client has future needs of lawyers' services and is, in short, a "property or commercial client" with whom the author is not concerned.

Is it reasonable to assume that these two classifications, most broadly considered, cover most of the legal problems of middle income persons which most lawyers, if not most potential clients, have had in mind?³⁰

27. The annual legal checkup, as a tool of preventive law, seeks to encourage an individual, especially a family head, to make legally appropriate provisions to protect and maximize his wealth and his intended uses of it. See, e.g., Brenneeman, *Annual Legal Check-Up*, 34 MICH. S.B.J. 33 (May, 1955); Brown, *A Family Legal Information Check List*, 3 PRAC. LAW. 60 (Oct., 1957).

28. E. BANFIELD, *THE UNHEAVENLY CITY* (1970).

29. See, e.g., Uhl, *Annual Legal Check-Up*, 31 KAN. B.J. 289 (1963).

30. On the one hand, the categories are sufficiently broad to include such specialized legal problems as eminent domain, zoning and related matters; workmen's compensation, unemployment compensation and social security disability claims; products liability cases; and selective service classification controversies (at least as criminal offenses). On the other hand, the few studies although indefinite, tend to support the assumptions of this review. See P. STOLZ, *THE LEGAL NEEDS OF THE PUBLIC: A SURVEY ANALYSIS* (Am. B. Foundation Res. Contribution 4, 1968); Mayhew & Reiss, *The Social Organization of Legal Contacts*, 34 AM. SOC. REV. 309 (1969). "The emphasis on the social organization of legal institutions as the source of patterns of contact between citizens and attorneys must be seen as a corrective to the common view that income in the form of funds to pay for legal representation is the crucial determinant of use of legal services The implication of our findings is that untreated problems exist for all segments of the community. Organized to serve property and a few other problems, notably divorces and accidents, the legal profession provides relatively little professional representation and advice in relation to a broad panoply of problems surrounding such daily matters as the citizens' relation to merchants or public authority. It cannot be said that such problems do not exist; our survey of citizen problems shows otherwise. But the institution of legal advocacy is not organized to handle these problems on a routine basis." Mayhew & Reiss, *The Social Organization of Legal Contacts*, 34 AM. SOC. REV. 309, 327 (1969).

Proceeding analytically, we may deduce without intellectual hardship two corresponding conclusions.

First, much of the middle class's utilization of (and projected need for) lawyers' services arises not for reasons compatible with the author's assumption of a "highly elastic demand" and a constricted supply, but from the private practitioner's monopoly.³¹ For most of the matters exemplified in the first category above, a lawyer's services are expected, if not formally required,³² as a prerequisite to achieving a legally binding resolution, that is, a divorce, an enforceable support order, a bankruptcy discharge or wage earner plan, an acquittal or reduced penalty in satisfaction of a criminal charge, and the like. Except for the very poor and, even for them only in some places, the services must be provided by a private practitioner, privately engaged and compensated by the needful party. The sole reason for securing such services may be their precondition to relief. That is, a person of moderate means may believe anything but that only a lawyer, or only a private practitioner, can provide such services, or that they are functionally needed at all (he could do it himself if it weren't so damn complicated) or that he will get his money's worth.³³

The clear implication, to laymen if not to lawyers, of the private bar's resultant monopoly is that the public interest demands either the destruction of the monopoly or its justification in terms of unique services available at a reasonable cost under conditions of widest availability and easiest accessibility. In this light, the proposition is not that lawyers *could* serve more middle income clients but that they *must* serve all classes better in those affairs in which they seek to require their

31. It is only a truism that lawyers have a dual monopoly: first, over the practice of law and, second, over what the practice shall include. The failure fastidiously to distinguish between the two kinds of monopoly facilitates confusion about the appropriate roles of the lawyer in our society; few would disagree that only lawyers should practice law, but many disagree over what the practice should include.

32. The need to establish a right to representation in civil matters, secured on the same basis as the right to counsel in criminal proceedings, has been urged in consideration of the plight of the unaided party in family law, consumer debt and other cases often involving middle income persons. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution*, 26 U. PITT. L. REV. 811, 819-824 (1965); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967). Cf. O'Brien, *Why Not Appointed Counsel in Civil Cases: The Swiss Approach*, 28 OHIO S.L.J. 1 (1967).

33. "People do not really want lawyers' services, even when they recognize they have legal problems. Surely, this diffidence, reinforced by traditional fears and suspicions, is a major deterrent to a great many people of moderate means." LAWYERS 35. Cf. F. RODELL, *WOE UNTO YOU, LAWYERS!* (1939).

services.³⁴ By extension of the same reasoning, if the organized bar does not establish and follow standards and procedures for serving the public interest so defined, this duty should be publicly met.

Second, insofar as the legal profession is organized primarily to serve wealth interests, there is considerable question whether lawyers are equipped to deal with the wealth problems of persons of moderate means. It is perhaps not incidental that to delimit this portion of the population, the author has relied upon personal income statistics, not accumulated assets or worth, as his wealth indicator.³⁵ On the other hand, he apparently assumes tacitly as the archetype of this class the nineteenth century man, who acquires property, preserves and multiplies it and then transmits it to the objects of his beneficence. While this model obviously continues to be replicated as a way of affluence, for example, through inherited wealth and capital growth, is it typical of middle-income wealth today? Or, to raise a question looking in a different direction from the lawyer's accepted vantage, will it likely be the model 30 or 50 years from now? Is it not more reasonable to conclude that the model for the author's client of elastic demand should be one of "new property" that Professor Reich has brought to our attention,³⁶ in which wealth is in the form of various assurances against invalidity, disability, old age and the dependency of survivors; that the primary means of wealth production is personal earning capacity; and that "personal and real property" are acquired and accumulated for present enjoyment and only incidentally for investment and intergenerational transmittal? If current trends are indicative of the future, even home ownership, the bastion of middle class security and the climax of wage-earned achievement, may decrease substantially in incidence, especially as urbanization expands.³⁷

If this model is more accurate, then it is apparent that for lawyers to serve people of moderate means they must not merely redirect their orientation and skills slightly to accommodate more services for the

34. These implications are of course horrifying. If, for example, the practice of law, or certain specialties of it, were to be regarded as a public utility, then rates would be set by a publicly responsible authority, franchises and licenses would be awarded with service an uppermost requirement and, while the regulatory agency might certainly be captured by the regulatees, the relative risk of officious interference into the bar's presently insulated prerogatives would rise enormously. Cf. *LAWYERS* 28-29, 56 n. 9.

35. See note 16 *supra* and accompanying text.

36. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

37. *BUR. OF CENSUS, STATISTICAL ABSTRACT* 679 (1970) (Table 1082), *New Housing Units Started, Selected Characteristics: 1960-69*.

protection of pension rights and insurance arrangements. They must instead create entirely new areas of practice around issues that now are embryonic in occasional test cases and on law review pages. If a person's wealth will be determined by his earning capacity, the factors affecting this capacity must achieve central concern from lawyers. Employment rights and union membership rights must be scrutinized.³⁸ "Annual Legal Checkups" must include inquiries into, for example, the educational tracks of a family's children upon which wealth potential, and the achievement of other values, so crucially depend.³⁹ Are their rights of social citizenship being denied;⁴⁰ that is, are they receiving less educational and other socialization advantages than they are entitled to by law or could legally acquire? Of course, most such contemporary rights, to the extent they are now recognized and protected, do not routinely require lawyers' services to secure them. A person does not typically employ an attorney to plan his pension rights, secure his social security benefits, or enable his children's or his own most advantageous education. That the content and the conditions of enjoyment and control of these "benefits" are bureaucratically determined and administered is broadly accepted by most of us, including lawyers.

The foregoing observations and their implications do not exhaust what may be taken into account from observable factors affecting the possibilities and directions of lawyers' more extensive services to people of moderate means. Three closely related but less well-noted sets of circumstances are brought to mind, especially from reflection on the kinds of lawyers' work which legal aid and legal services programs have performed, or been called upon to perform, for indigent persons.⁴¹

38. See, e.g., Affeldt & Seney, *Group Sanctions and Personal Rights—Professions, Occupations and Labor Law*, 11 ST. LOUIS U.L.J. 393 (1967); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *The Duty of Fair Representation and Its Applicability When a Union Refuses to Process an Individual's Grievance*, 20 S.C.L. REV. 253 (1968); Note, *Substantive and Procedural Due Process in Union Disciplinary Proceedings*, 3 U. SAN FRAN. L. REV. 389 (1969); Note, *Employee Interrogation as "Inherently Destructive" Conduct: A New Approach*, 15 VILL. L. REV. 690 (1970); Comment, *Court Enforcement of Union Fines*, 25 WASH. & LEE L. REV. 273 (1968).

39. See, e.g., Rice, *The Economic Value of Human Life*, 57 AM. J. PUB. HEALTH 1954 (1967).

40. See J.H. MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT 95-115 (1964).

41. The author's sweeping and widely shared assertion that legal aid and legal services programs have aroused a broad demand and need for lawyers' services among poor people, which implies an equally broad market potential among people of moderate means, see note 22 *supra*, is a truth misleading in its simplicity. Four qualifications are pertinent: (1) Required lawyers' services, and the backlogged need for them, see notes 26-30 *supra*, have accounted for much of the work done by legal aid and legal services programs (especially in the latter's early days), see statistics reported in, e.g., Fisher, *The Role of the Legal Aid Society in Relation to the Community Action Program in the District of Columbia*, 32 J.B. ASS'N D.C. 375, 376 (1965); Sykes, *Legal Needs of the Poor in*

First, there are a great number of legal problems which do not permit of lawyers' services in the traditional one-to-one attorney-client relationship simply because of the economics involved. A multitude of consumer complaints fall into this category: unhonored warranty claims, breached household moving agreements, abusive debt collection practices, misrepresentation of product or service quality and performance, unconsented repossession of household goods, and so on. Typically, the value in controversy does not approach the cost or potential cost of a private practitioner's services to obtain satisfaction, especially if litigation is anticipated. Only when the legally recognizable

the City of Denver, 4 L. & SOC. REV. 255 (1969). (2) "The experience of the author and of other legal services attorneys is that the legal problems of the very poor, like those of the very rich, are considerably more frequent, more complex and more difficult than the legal problems of the vast middle portion of the population. The legal problems of the middleclass person tend to be personal, idiosyncratic. In contrast, the legal problems of the very poor or very rich persons tend to involve issues common to the entire economic class; each class has a group interest in institutions and institutional practices, in governmental policies, programs and laws. Oil depletion and public assistance allowances, requirements of disclosure in applications for unemployment benefits and in stock and bond transactions, all present complex legal issues and affect the rich and the poor, as groups, far more than any similar policies affect the middle class.

And, like the rich, the poor have substantially more legal problems per person than the middle class. A middle-class client approaches a lawyer with one, or at most two, pressing problems—a divorce, a will, a real estate transaction, a fence dispute. There are, however, in addition to the single acute problem which caused the poor client to seek legal advice, almost always in his social history a cluster of other legal problems." Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseloads*, 46 J. URBAN L. 217, 218 (1969) (footnotes omitted). (3) Legal services programs have been dogged by confusing, conflicting and debilitating direction nearly since their inception. The principal division has occurred between the objective of immediate services to as many walk-in clients as possible versus the goal of law reform campaigns to change the laws and legally sanctioned institutions which affect and entangle the poor. See Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967). While the leadership of the Legal Services division of OEO has been ambivalent in its crucial role of spelling out guidelines by which funded programs can be evaluated, see Hannon, *The Leadership Problem in the Legal Services Program*, 4 L. & SOC. REV. 235 (1969), and at this writing is numbed by political crosswinds, it is the reviewer's understanding that the forces of law reform, whatever and however limited that is, see Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242 (1970), have prevailed at the program level. It seems that the victory, if overindulgence in irony is permitted, owes as much to a recognition that poor peoples' legal problems are the direct result of identifiably and potentially remediable social conditions as to forced entrenchment against the beseeching hordes at the neighborhood law office door. (4) Finally, and most significantly, some poverty lawyers, realizing their short terms of service, the dullness of their work and its underuse of their training, as well as the overwhelming demand for legal services from poor people, have reached this conclusion: "Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves. This is not the traditional use of a lawyer's skills; in many ways it violates some of the basic tenets of the profession. Nevertheless, a realistic analysis of the structure of poverty, and a fair assessment of the legal needs of the poor and the legal talent available to meet them, lead a lawyer to this role." Wexler, *Practicing Law for People*, 79 YALE L.J. 1049, 1053 (1970).

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injury approaches a threshold value is an attorney in any economic position to consider taking such a case.⁴² For many otherwise actionable causes, it is doubtful that even maximum efficiency of legal practice, including specialization and the most effective use of paraprofessionals, could obtain a price successful on any supply-and-demand, market economy basis, much less meet any standard of public interest imposed to justify a monopoly of private practitioner services.⁴³

While like problems may not be limited to consumer complaints, proposals advanced in public forums for their deterrence and resolution furnish adequate examples of alternative legal solutions: (a) minimum recovery and attorneys' fees provisions which create an economic base for a private practitioner's participation at the cost of imposing what is considered to be or amounts to a civil penalty on the unsuccessful defendant;⁴⁴ (b) class action rules, permitting the aggregation of

42. Inasmuch as the primers of modern law practice economics inform the professional that his fee should be calculated on the ultimate basis of the annual income he seeks, plus an adequate allowance for office overhead costs and a percentage increase to cover the risks entailed by contingent fee arrangements, *see, e.g., Fuchs, Fees and Fee Determinations*, in PROCEEDINGS OF THE 1ST NAT'L CONF. ON LAW OFFICE ECONOMICS AND MANAGEMENT 30 (Economics of Law Series 7, 1965), it is not illogical to conclude that a consumer's effective right of redress for a wrong done him depends on whether the injury is sufficiently large or the injurer's conduct sufficiently callous and wanton to obtain a recovery above the "threshold" that assures the attorney his calculated fee. The effect is two-fold; one has no effective legal protection unless he has been severely wronged, and each lawsuit must be a mountain even if the parties involved would have been willing to settle on a molehill. This phenomenon is demonstrated remarkably in the law of abusive debt collection practices, the enforcement against which remains largely in private practitioners' hands. *See, e.g., Thompson v. General Finance Co.*, 205 Kan. 76, 468 P.2d 269 (1970) (\$16,000 award in action for false arrest and malicious prosecution growing out of \$500 time sale); *Pack v. Wise*, 155 So. 2d 909 (La. Ct. App.), *cert. denied*, 245 La. 84, 157 So. 2d 231 (1963) (recovery of \$2,000 in lost earnings and \$3,000 in punitive damages for unreasonable interference in employment relationship). In other situations of wrongful conduct to consumers, in which punitive or special damages are not availing and out-of-pocket losses are no more than a few hundred dollars, redress is wanting. *See, e.g., Mueller, Contracts of Frustration*, 78 YALE L.J. 476 (1969); *The Moving Man Cometh (Maybe)*, 35 CONSUMER REP. 302 (1970); *Moving: Still the Rough Road to Home*, 33 CONSUMER REP. 272 (1968).

43. "[I]t must be acknowledged that the possibilities for . . . reduction [in the production costs of lawyers' services] appear limited. Because of the very nature of the American legal system, the services of lawyers usually must be custom products. A client's specific legal difficulty must be evaluated in the light of a complex accretion of law, and the solving of a particular problem typically requires prediction of how a changing body of law will develop. Preventive or remedial measures must also be tailored to fit both the facts and the applicable law. The lawyer is thus required to choose carefully among complex alternatives at almost every step. This is an inherently costly procedure, and there seem to be few ethically acceptable methods of reducing the cost of doing it." LAWYERS 41.

44. *See, e.g., OKLA. STAT. ANN. tit. 14A, § 5-203(1) (Supp. 1970); R.I. GEN. LAWS § 6-13.1-5.2 (Supp. 1969); VT. STAT. ANN. tit. 9, § 2461(b) (Supp. 1970)* (permitting recovery of up to \$1,000

common legal interests into a single suit productive of adequate attorneys' fees;⁴⁵ (c) public enforcement schemes, through governmental agencies, existing and proposed, to obtain injunctive relief against future illegal acts and, by streamlined procedures, recovery to individuals previously injured by the same conduct;⁴⁶ and (d) reduction or elimination of the legal cause or permission for the complaint itself, as has occurred in the instance of restriction of wage garnishments⁴⁷ and as enacted or proposed by restriction of negotiability of consumer paper.⁴⁸ In comparison with these methods, the devices which the author discusses as means to increase lawyers' "relevancy" may promise such minor effectiveness or relative social unimportance that an isolated consideration of them is an unreal way of approaching the goal of acting in the public interest.

Second, the legal interests of persons of moderate means are defined to a large extent through lawyers' customized services to "commercial and property clients". The great majority of the legally enforceable relationships into which persons "voluntarily" enter, from purchasing durable goods and continuing services to renting or buying living space to accepting employment status to procuring occupational licenses to acquiring educational benefits, are created by institutions (including, of course, governmental agencies who like commercial and property clients, do not seem to suffer under current modalities for the distribution of lawyers' services) whose counsel draw the agreements and prescribe the legally enforceable niceties that the other party—the consumer

in addition to actual damages); *An Act to Prohibit Unfair and Deceptive Trade Practices*, 7 HARV. J. LEG. 122, 151 § 3-406 (1969).

45. See, e.g., Uniform Deceptive Trade Practices Act §§ 1(5), 3(a), 7 UNIFORM L. ANN. 340, 342, 244; CAL. CIV. CODE § 3369 (West Supp. 1968); R.I. GEN. LAWS § 66-13.1.2 (Supp. 1969); S. 3201 (Consumer Protection Act), 91st Cong., 2d Sess. as reported by S. COMM. ON COMMERCE, S. REP. 91-1124 (1970); *An Act to Prohibit Unfair and Deceptive Trade Practices*, 7 HARV. J. LEG. 122, 150, § 3-402 (1969); Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 B.U.L. REV. 211 (1969); *Part II: Considerations of Procedure*, *id.* 407.

46. See, e.g., Federal Trade Comm'n Act, 15 U.S.C. § 45 (1960); 3 DEL. CODE tit. 6, § 2523 (Supp. 1968); ILL. ANN. STAT. ch. 121 ½, § 267 (Smith-Hurd Supp. 1971); IOWA CODE ANN. ch. 55, § 713.24(A) (Supp. 1969); VT. STAT. ANN. tit. 9, § 2458 (Supp. 1969); Uniform Deceptive Trade Practices Act § 3, 7 UNIFORM L. ANN. 340, 344; cf. ME. REV. STAT. ANN. tit. 5, § 210 (Supp. 1970) (permitting restitution to aggrieved buyers as part of assurance of discontinuance).

47. See, e.g., Consumer Credit Protection Act, 15 U.S.C. §§ 1671 *et seq.* (Supp. 1970); KY. REV. STAT. § 427.010 (Supp. 1970).

48. See, e.g., Uniform Consumer Credit Code §§ 2.403, 2.404; MD. ANN. CODE art. 83, § 147 (1968); MASS. GEN. LAWS ANN. ch. 225, § 12c (1968); N.Y. PERS. PROP. LAW § 4031 (3) (McKinney 1962); VT. STAT. ANN. tit. 9, § 7455 (Supp. 1968); WASH. REV. CODE ANN. § 63-14.020 (Supp. 1968); Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969).

writ large⁴⁹—has no realistic choice but to accept if he wishes to obtain the benefits of the relationships at all. In this light, the lawyer's notion of an adversary system of justice is unreal. The issue of public interest is not that consumers are deprived of lawyers' services because of systems-delivery inadequacies, the overcoming of which would redress imbalances and inequities. It is instead that the orderings of modern society demand mass-produced legal relationships, the benefits of which, in terms of convenience and lower price, accrue to both the seller or provider and the buyer or recipient. The challenge thus lies in the design and enforcement of legal products that will work fairly and efficiently to order the rights and responsibilities of innumerable consumer parties in similar relationships.

Is it unreasonable to suppose that the one-sidedness of such legal products may well account for a large number of the legal problems which are perceived to plague people of moderate means? The fine print of "contracts" and "rules" and "conditions", which it seldom serves the consumer much utility to read before submitting to, limit warranties, impose restrictions on the exercise of tenanthood and employment, limit procedural relief, avoid implications of face-to-face bargaining, and otherwise by preventive draftsmanship effectively preclude the other side from being able to use a lawyer's services, unless of course his injury growing out of the relationship is so great as to encourage a full scale attack to overturn or override the consented-to-provisions on the basis of larger, judge-made, statutory or constitutional law. Again, one need only look at the current trends in consumer law to see that a remedy proposed with increasing frequency is to subject both form and content of standardized agreements to public regulation in the interests of both parties, so that contractual obligations will be determined in the public interest in much the same way that content and quality of goods and services are now regulated for purity, wholesomeness, adequate description and representation, and performance.⁵⁰ While some of these trends may result in increasing need for lawyers by increasing

49. As the text indicates, the term "consumer writ large" has a wider reference than the word "consumer" in ordinary lawyer's or layman's language. Cf. Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963). Hereinafter, "consumer" should be understood to convey this special meaning.

50. See, e.g., S. 3074 (Consumer Products Warranty and Guaranty Act), 91st Cong., 2d Sess. as reported by S. COMM. ON COMMERCE, S. Rep. 91-876 (1970); Leff, *Contract as a Thing*, 19 AM. U.L. REV. 131 (1970).

consumers' effective rights of action, many of them will remove the causes of the legal complaint in the first place.⁵¹

Third, people of moderate means for the most part are not organized for the employment of lawyers to secure their common interests. Labor organization, the dominant exception to this statement, began as a means to make popular the once "unpopular cause" of improved remuneration and other employment conditions of workers. The origins of present nationally prominent examples of collective action which include substantial numbers of middle income persons are similar. Civil rights and civil liberties associations, women's liberation groups, anti-war and anti-draft groups, taxpayers, associations, environmental and ecological coalitions and homosexual societies are efforts using legal strategies, among others, to obtain community acceptance and protection of interests which have not been dominant and which for their assertion have encouraged the power of collective action.

The concern of *Lawyers for People of Moderate Means* and of this review, however, is not with unpopular causes. For the protection of many of the interests of daily life, including the acquisition and use of housing, food, drugs, durable goods, and educational and health services, there seem to be few pervasive and enduring organizations. Even such patently consumer oriented associations as buying cooperatives and credit unions have, respectively, never gained any consequential hold in American society or are moving away from their original membership orientation to become aggressive competitors in the consumer market place.⁵²

A kind of resultant organization has been imposed on consumers, however, by the standardized agreements and conditions that compose mass-produced, legally supported relationships. Both the design of a product or service offered for sale and the development of the conditions of entitlement to governmental benefits are based not only upon the purposes of the maker or provider but upon its bureaucratic assessment of the "target population", "potential market", or "intended beneficiaries". The shape of the assessment is determined by indicators

51. Or reducing it to a factual dispute which can be settled by informal arbitration or otherwise without need of lawyers' services. Cf. Mueller, *Contract of Frustration*, 78 YALE L.J. 576 (1969).

52. Credit unions with large assets and membership tend to compete directly with consumer banking institutions, enjoying competitive interest rates and a comparable management drive to employ loaning capacity fully. The recent extension of Federal Deposit Insurance to credit union share accounts, Pub. L. 91-468 (1970), and proposals for a centralized banking system for credit unions, for them to issue credit cards and offer checking account services, and the like, see *Summary of Proposed Recodification of Federal Credit Union Act*, 4 FED'L CREDIT UNION OBSERVER Mar. 1970, at 2-7; Credit Union Magazine, Jan. 1971, at 19-20, are encouraging the competition.

to which the bureaucratic procedures administering mass-produced legal relationships can be responsive, that is, by a limited number of measurable, identifiable characteristics. The result is that products and benefits are suited to a hypothetical person—not even the lawyer's "reasonable man", but the data specialist's "profile" or "composite" or "average person", which exists only in the abstraction of the measured characteristics of the sample selected for study. Individual variations are recognized only as ranges of distention of the average or mean. The result is also that anyone who is subject to or enters into a standardized legal relationship, whether to purchase a home appliance, rent a dwelling, or go to school, becomes—is treated as though he were—one of a group proxied by an abstract person or range of variables, the average appliance purchaser, the average tenant or the average schoolchild. The individual's interests are thus replaced by the deemed interests of the bureaucracy's hypothetical person. As the number of standardized relationships decreases in any sector, the opportunities for the individual to follow his interests proportionately decrease. The popular way of expressing this social condition is to state that one's choices—of social insurance, housing, automobiles, hospital care, schooling, etc.—are increasingly limited, and the limited opportunities which do remain are more likely not to be responsive to any individual's (or substantial number of individuals') needs, preferences or expectations; one must fit in or opt out.

This description is, of course, unduly narrow. Bureaucratic orders can be responsive to variations in individuals, and, however slowly, differentiations have become recognized as categories or classifications within or among standardized relationships. There are special schools for gifted children and slow learners; fish-and-chip outlets to compete with fried chicken stands; well-baby and sick-baby clinics; retirement developments and singles apartment complexes; Plan A's and Plan B's; and options one, two and three. All of these developments, however, are results of changes in a limited number of measured features; a further bureaucratization more replacing an individualized relationship than affording a significant or substantial responsiveness.

Moreover, the bureaucratic systems that administer standardized legal relationships are not routinely open to outside inputs that would change their ordered patterns and standards for decision-making. "Everyone knows" that statistics can prove anything; that the managers of bureaucracy are not encouraged in their roles to recognize that their agencies might fail to achieve their purposes, non-bureaucratically

defined, or to recommend that their number or importance should be reduced or non-perpetuated, for any purpose; and that, accordingly, only those characteristics of the individuals dealt-with (consumers) are measured (in certain ways, under certain conditions and at certain times) which serve the bureaucracy's goals and the objectives of those to whom it considers itself responsible.⁵³ While it may be argued whether some managerial orders are responsive to anyone but themselves, it cannot be gainsaid that some are least responsive to those who consume their products, that is, to the consumers' exercise of any power or authority over the relationship which might disorder or reorder it and the legal support for it. One or a group does not often find it feasible to rewrite the warranty section of a durable goods purchase agreement, or to relocate a school so that its facilities are more readily accessible, or to negotiate a medical insurance plan to cover the particular risks sought to be diminished. It is not that a fair and equitable bargain could not be struck; it is that the channels and manuals of bureaucracy are not prepared to cope with such initiative.

What, in this context, is the role of the lawyer? Certainly he may represent the individual who wishes to defy the bureaucracy for the realization of his deemed eccentricity; it is doubtful, however, that a market place bargain for the necessary services could be reached, even with the greatest accessibility of middle income persons to lawyers and their greatest expertise and efficiency. The cost of fighting the bureaucratic establishment is too high; the value of the goods or services involved is outweighed by the costs of the challenge, and the extra value of the customized product is outweighed by the extra cost of its unique production. The more fruitful course is representation of consumers as interest groups, in ways not incomparable with the legal representation of "property and commercial" associations and organizations for unpopular causes. Test case litigation (class action or otherwise), representation before regulatory bodies, legislative drafting and lobbying all require some foundation in group support, both to make the most effective case and finance the lawyering. While individual clients may occasionally have the resources and be willing to be the guinea pig

53. Scholarly writing on bureaucratic organization and behavior tend to be either highly conceptual treatises or highly particularized case studies. See, e.g., P. BLAU, *THE DYNAMICS OF BUREAUCRACY* (1955); *READER IN BUREAUCRACY* (R. Merton *et al.* eds. 1952). For pithy authority supporting the assertions about bureaucracies stated in the text, the reader is referred to Downs, *Nonmarket Decision Making: A Theory of Bureaucracy*, 55 AM. EC. REV. 439 (Supp. 1965); Dumont, *Comment . . . Down the Bureaucracy!*, 7 TRANS-ACTION, Oct. 1970, at 10.

entirely on their own, such "sole clientism" is probably rarer than it appears to be.

None of the strategies discussed in *Lawyers for People of Moderate Means* reaches the question of the practitioner's appropriate role in serving resultantly organized middle income persons who must be purposively organized effectively to obtain power in the bureaucratic processes that affect their interests as consumers. The ethics of the profession forbid solicitation of legal business.⁵⁴ "Stirring up" is bad. Advertising is permitted only through the impersonal campaigns of professional organizations and the publicity gained by individual lawyers in ways ostensibly unrelated to their practice.⁵⁵ Any attempt by a lawyer to organize consumer constituents incurs the risk that he may be adjudged guilty of soliciting business from the organization or among those organized. Group legal services depend on the previous formation of the group; recognized specialization in the law of consumer organization depends upon its previous existence. The ideal of the attorney-client relationship is the individual lawyer and the individual client, or the law partnership and the business corporation, whose connection is made through the classic contract metaphysics of offer and acceptance,⁵⁶ is bound by the consideration of services for fee, and is performed through the confidentiality of personal allegiance.

III.

Lawyers for People of Moderate Means is styled a "modest"⁵⁷ study "concerned with only a small part of the question of relevance"⁵⁸ but cognizant of the "social upheaval now taking place."⁵⁹ The author admits that his answers to the narrow questions about "how lawyers produce and distribute their services"⁶⁰ rest on assumptions "hoped . . .

54. ABA CODE OF PROFESSIONAL RESPONSIBILITY Ethical Consideration 2-3.

55. *Id.* Disciplinary Rule 2-104.

56. *Cf.* Black, *Some Notes on Law Schools in the Present Day*, 79 YALE L.J. 505, 507 (1970) (Professor Black on first teaching contracts); *cf.* LAWYERS 195-96. A good deal of confusion may arise between attorney and middle income client over whether a "trusted relationship," that is, a continuing "requirements contract" exists between them justifying the attorney's volunteering further legal assistance as he may see it required. *Cf.* MISSOURI BAR—PRENTICE HALL SURVEY 107 (1963); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseloads*, 46 J. URBAN L. 217 (1969).

57. LAWYERS xiv, 3.

58. *Id.* 23.

59. *Id.* 292.

60. *Id.* 3.

[to be] somewhat more reasonable than the ones they are meant to supplant” but no substitute for “comprehensive empirical studies . . . [obtaining] increased knowledge about the profession—where lawyers are, what they do, how they do it, and why.”⁶¹

For what, then, does the book stand? It is a culmination of the author’s anticipation of a series of issues affecting availability of lawyers’ services that have occupied and will continue to occupy for some time a part of the profession’s attention. It is, whether intended or not, a responsive pleading, a defense or rebuttal to the indictment that the law is dead in the minds and needs of people of moderate income, and that its apparent hardness rests on institutional (and bureaucratic) inertia and the powerful position that lawyers occupy because they are the ministers of the authoritative order.⁶² It is especially remarkable that the author has chosen to excise from consideration those lawyers’ services recognized as most continuing and crucial: the defense of criminal charges, the protection and advancement of unpopular causes and the furthering of commercial and property interests.

The indictment has come in many voices, some from within the bar and some from outside, some clear and precise and some indistinct and vague, some strident and attention-getting and some muted and passed by. From within the bar, four are principal: that private practitioners do not obtain enough income;⁶³ that there are too many lawyers—too many cost-accountable hours of lawyers’ time—available for the amount of services now rendered;⁶⁴ that the expertise, ethics and public repute of the lawyers that most frequently have professional contacts with people of moderate means are below the standards of the elite that has symbolized and spoken for the profession;⁶⁵ and that substantial numbers of graduates of law schools are not now motivated to apprentice themselves

61. *Id.* 296.

62. Cf. Oelsner, *Lawyers Turn to Middle Class Clients They Admit They Forgot*, N.Y. Times, Aug. 14, 1970, at 1, col. 7.

63. See, e.g., KY. ST. B. ASS’N. COMM. ON ECONOMICS OF L. PRAC., SUMMARY OF THE 1967 ECONOMIC SURVEY OF KENTUCKY LAWYERS. See also note 78 *infra*.

64. “Large firms engaged in expensive recruiting programs generally feel there is a shortage of law graduates whereas other attorneys take the position the profession is overcrowded and there is not enough legal business. Most of us reach our own conclusions in this area based upon our own personal experience rather than through proper research. . . . [S]urveys . . . have generally only scratched the surface.” *ABA Comm. on Economics of Law Practice, Report*, 94 ABA REP. 167 (1969); cf. J. CARLIN, *LAWYERS ON THEIR OWN* (1962).

65. *LAWYERS* 31-32.

into the careers in commercial and property law which established law firms offer them.⁶⁶

From the public (including some lawyers sometimes) the indictments are more diffuse. They range from the "unauthorized practice" of non-lawyer specialists⁶⁷ to the occasional, usually reprehensible crafted books and articles that reduce lawyers to scabrous life and their services to bumbling ineptness.⁶⁸ Some indictments are serious, and their dismissal is uncertain; if widely adopted on a broad scale, group legal services, as sanctioned by that portion of the public sitting on the Supreme Court of the United States,⁶⁹ may seriously reduce private practitioners' income and occupation and invite invidious comparisons of costs of legal services.⁷⁰ Similarly, non-fault insurance schemes for resolution of motor vehicle accident claims⁷¹ threaten to take away much of the business of a substantial portion of the bar who deal with people of moderate means.⁷²

66. See, e.g., Reinhold, *New Lawyers Bypass Wall Street*, N.Y. Times, Nov. 19, 1969, at 37, col. 4; Nader, *Law Schools and Law Firms*, THE NEW REPUBLIC, Oct. 11, 1969, at 20. That law students are motivated to work for Wall Street and similar firms does not of course infer they are interested in representing persons of moderate means in the kinds of matters discussed in this review, especially so long as such practice is demeaned within the bar and is not socially fashionable or compelling. See note 79 *infra*.

67. See, e.g., Viles, *The Process of Estate Planning: The Participation of Attorney and Insurance Representative as Professional Specialists*, May, 1965 (unpublished paper).

68. See, e.g., M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968).

69. *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

70. Our first proposal for American lawyers is that work which can more effectively be disposed of on a mass volume basis should be channeled to law offices that will handle it on that basis Among the many matters we think adapted to mass disposition by law offices are most aspects of conveyancing and mortgage lending, administration of decedents' estates, trust administration, small debt collection, preparation of income tax returns for salaried persons, real estate tax contests, eminent domain controversies, bankruptcy proceedings, automobile negligence cases, workmen's compensation cases, and traffic violation proceedings. . . . Steps we recommend to channel more work into mass operation law offices are these: set up mandatory maximum fee schedules providing for substantial cuts in presently prevailing fees so only efficient high volume operations can profitably do the work; lawyer advertising and solicitation directed at both clients and referrers; and encourage extension of group practice schemes under which members or employees of organizations are entitled to legal service provided by or through the organization.

Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* 543-44 (1967). Cf. Greenawalt, *Group Legal Services—Why, and How*, 41 N.Y.S.B.J. 300 (1969).

71. See, e.g., Hodosh, *Three New Automobile Insurance Plans and the Claims Function*, 1969 INS. L.J. 705; see also R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965).

72. See, e.g., King, *"No-Fault" Auto Insurance is Stalled in Legislatures*, N.Y. Times, Nov. 15, 1970, § 1, at 70, col. 4.

As a responsive pleading to these indictments *Lawyers for People of Moderate Means* does not deny the allegations. It attempts, with caveats, to raise an affirmative defense by reliance on the simplistic concepts of economic analysis: if lawyers would advertise their products more extensively, merchandise their wares more attractively, and cut costs and improve products through cheaper and more specialized labor, more and better products would be sold at cheaper prices. Thus, everybody—buyer and seller—would be happy, and the public interest would be served.

The success of this model, and the author's defense, depends on elasticity of both the demand for legal products and the supply of lawyers' services. That the supply is more than adequate (although lacking in quality) is admitted;⁷³ that the demand, as limited by the broad exclusions of the book, is highly elastic is premised upon analysis of what lawyers now do for persons of moderate means⁷⁴ and what legal aid and legal services attorneys have done for poor people.⁷⁵ If in fact demand is saturated because lawyers' services are required to attain their clients' objectives, this book must be evaluated from a different perspective: not what lawyers could do to serve middle income people more extensively, but what they must do to justify their monopoly. In this light, the content measures a small advance, especially by urging the expansion of group legal services and suggesting how this device can be accommodated within the ethics of professional responsibility that safeguard the direct relationship between attorney and client.

If the demand is relatively constant, however, the author's economic model requires that the supply be reduced in order to achieve lower cost through use of cheaper paraprofessionals, more expert specialists and other more efficient practices for production and distribution. There are few trends or perspectives to suggest that the national or urban supply of lawyers generally will decrease or be encouraged to decrease,⁷⁶ but there

73. While in one place the author allows that "measures taken to make lawyers' services more readily available to people of moderate means may . . . result in a demand beyond the capacity of the present legal profession to supply," LAWYERS 26; cf. note 78 *infra*; he elsewhere tacitly acknowledges that the supply, especially of lawyers now serving middle income people, may be more than adequate. Two pages later, for example, he talks of the problems of ethical "competition" among lawyers within a "legal services monopoly." LAWYERS 27-29.

74. See notes 26-30 *supra* and accompanying text.

75. See note 41 *supra*.

76. The arguments for increased production of attorneys are long on rhetoric and short on substantiation; most seem based on society's past capacity to *absorb* lawyers or on the value proposition that since lawyers' services are "vital" in increasingly legally-ordered communities,

is ample evidence that bar organizations and individual attorneys will oppose any reduction in the scope of their practice and its monopoly. The legitimacy of group legal services has been curbed by the American Bar Association;⁷⁷ specialization in the kinds of lawyers' services which people of moderate means now use has either failed to lower costs⁷⁸ or has not occurred or been encouraged;⁷⁹ and insurance schemes for

there is need for more of them. See Katzman, *There is a Shortage of Lawyers*, 21 J. LEG. ED. 169 (1968). But cf. DEP'T OF LABOR, BUR. OF LABOR STATS., OCCUPATIONAL OUTLOOK FOR COLLEGE GRADUATES (Bull. 1681, 1970) ("Graduates of the less well-known schools and those who graduate with lower scholastic ratings may experience some difficulty in finding salaried positions as lawyers. . . . Prospects for establishing a new practice will probably continue to be best in small towns and expanding suburban areas. In such communities, competition with other lawyers is likely to be less than in big cities. . . . [C]ontinuing a recent trend, the number of lawyers in independent practice may remain stable or decline somewhat.") "Far too little thought and study have been given to the issues of optimum size of the legal profession, both nationally and in individual states, and the proper relationship of admission standards to professional size. We feel that these subjects should be fully and openly discussed and policies then set expressly dealing with them." Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* 557 (1967); cf. Goldman, *Lawyer Supply and Demand in Kentucky over the Next Decade*, 59 KY. L.J. 189 (1970).

77. See note 2 *supra*. But cf. Greenawalt, *Group Legal Services—Why, and How*, 41 N.Y.S.B.J. 300 (1969). "What is there to gain if lawyers move ahead in allowing and rendering group legal services? First, a new economic market will be opened—people want these services and are not getting them now. The market is there and others are moving in on it. I suggest we can actually overall increase our earnings as lawyers, as a profession. Secondly, some of these areas that I have mentioned, such as real estate agreements and the drawing of wills, would be placed back in the hands of lawyers. Third, public acclaim and an upsurge in all requests for legal services will follow." *Id.* 307.

78. Many of the lawyers' products most frequently sought by persons of moderate means are covered by minimum fee schedules promulgated by state and local bar associations throughout the United States. The 1966 ABA STATISTICAL ANALYSIS: RECOMMENDED MINIMUM FEES FOR SELECTED LEGAL SERVICES, for example, indicates the following national range of minimum fees: uncontested divorce—median \$200 (high, \$500; low, \$75); uncontested verification of clear title to real estate—median, \$250 (high, \$550; low, \$250); and personal, non-asset bankruptcy—median, \$200 (high, \$400; low, \$75). *Id.* 4-5. Although trends in recommended minimum fees through time are not easily ascertainable, it is well known that the minimum fee device has been promoted since the 1950's as a way of improving attorneys' income through collective action avoiding the income-reducing effects of client shopping and other competition. See, e.g., AM. B. ASS'N SPECIAL COMM. ON ECONOMICS OF L. PRAC., *LAWYERS' ECONOMIC PROBLEMS AND SOME BAR ASSOCIATION SOLUTIONS* (Economics of L. Prac. Series 2, 1958); AM. B. ASS'N STANDING COMM. ON ECONOMICS OF L. PRAC., *MINIMUM FEE SCHEDULES* (1970). A comparison of minimum recommended fees for uncontested divorces, as stated in the 1966 and 1970 publications cited above, indicates that the high, low and most-used standards have increased in nearly all populous states during that span of time.

79. Except for such esoteric practices as patent and trademark law or admiralty law, specialization is usually recognized as a consequence of the diverse and sophisticated service needs of the property and commercial clients of large law firms or in large cities. *LAWYERS* 99-101. The development of specialties is strengthened by topicalized bar association sections, learned treatises, commercial services, technical periodicals, law school courses, continuing legal education programs and other organizational, informational and skill-increasing aids.

Washington Solo practitioners and other lawyers who tend to predominate in service to people of moderate

prepayment of lawyers' services not only have been little tried but raise strong risks of eventual public intervention in fee-setting, if the medical services analogy is apt.⁸⁰

Lawyers for People of Moderate Means all too clearly reflects the corporate vision of the legal profession and its understanding of itself and the public with an interest in its services. Protestations of modesty and diffidence do not overcome the ploys of resorting to selected assumptions and their rationalistic interpretation and of taking refuge in pleas that further study is necessary. Only a lawyer could have the gall to consider availability of lawyers' services to people of moderate means without analyzing the services themselves and their social roles.

There is evidence in the pages of the book that the author fully recognizes the challenges to the legal profession which it will refuse to confront at its peril:

Among the most immediate and pressing are questions about how society is to be ordered, how differences are to be resolved, and who is to have a

income may become specialists in family, bankruptcy, criminal, property and other law. Because this specialization is often unintended, unwanted, unremunerative and not conducive to efficiency (because client demands for service do not take up all the lawyer's time), it has not stimulated the degree and extent of support gained by the attractive specializations, which in turn has retarded growth in responsiveness to individual and social needs.

LAWYERS FOR PEOPLE OF MODERATE MEANS has few suggestions for overcoming this condition as a problem distinct from the bar's current agonizing over recognition of the more prominent and advanced specialties. *Id.* 148-49. Neither have law schools helped very much, for the legal problems of people of moderate means are neither the mainstay of the profession nor the magnets of public law and public policy. For example, law schools have shown little more interest than the practicing profession in developing special legal paraprofessionals, that is, in devising ways by which lawyers can avoid spending time doing unremunerative work not needing more of a full professional's time than oversight or supervision, a plight that seems to drag down the lawyer serving middle-class persons anxious to get any business he can. Nor have law schools demonstrated much interest in furnishing students with skills useful in understanding and communicating with clients under strong emotional stress, for example, in family and criminal matters. Nor have law schools considered it their role to train law students especially in roles as diagnosticians of needs for legal services, especially the needs of persons of moderate means. *Cf.* notes 27, 41 *supra*.

80. While it has been well recognized that increases in physicians' fees followed the enactment of Medicare and Medicaid by the Social Security Amendments of 1965 (*see, e.g.,* Marmor, *Why Medicare Helped Raise Doctors' Fees*, 5 TRANS-ACTION, Sept., 1968, at 14), the remonstrance against "Skyrocketing" health care costs has been more circumspect toward physicians' fees than hospital, drug and other provider charges. *See, e.g.,* DEP'T OF HEALTH, EDUC. AND WELFARE, SOCIAL SECURITY AD., REIMBURSEMENT INCENTIVES FOR HOSPITAL AND MEDICAL CARE: OBJECTIVES AND ALTERNATIVES (Res. Rep. 26, 1968). Medical doctors and their incomes have not, however, escaped unscathed. *See, e.g.,* *Hearings on the Dep'ts of Labor and Health, Educ. and Welfare Appropriations for 1971 before the Subcomm. on Dep'ts of Labor and Health, Educ. and Welfare and Related Agencies of the House Comm. on Appropriations*, 91st Cong., 2d Sess., pt. 4, at 611 (1970).

part in those processes. Such questions are going to be answered, one way or another, and soon. Many of them are even now being answered. And it is far from certain that the old order—the law, the legal system, and the functions of lawyers—will survive entirely unchanged. If the legal profession is to have any positive or creative part in determining what the legal order of the future is to be and what part lawyers are to have in it, then prompt and rational consideration must be given to these problems. In no other way can lawyers hope to contribute meaningful answers or preserve important public and professional values.⁸¹

Notwithstanding its technical excellence and the steps of progress it endorses, the narrowness of the book is swallowed up by the enormity of the challenge. Tinkering with the mechanics of practice is not enough. Accepted legal credos are no longer adequate; the requirement of the cherished rule of law, for example, that “day-to-day decisions . . . [must be] reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation”⁸² ignores the values and ways of bureaucratic organization and decision-making that day-to-day affect the interests of consumers writ large. In a society of grouped interests, the supremacy of the one-to-one lawyer-client relationship created by the client’s knocking on the lawyer’s door must give way at least to some experimentation of new relationships “in the public interest” that will both preserve the integrity of lawyers’ professional services and produce accepted ways of practice.⁸³

Readers must look elsewhere for guidance to redirect the legal profession to the fullest use of its capabilities in preventing the breakdown of the democratic system and the achievement of genuine social justice. They must look to the individual lawyers who, proceeding from the independent responsibility that marks the profession, will have the initiative and spirit to respond skillfully and perceptively to the emergent legal problems of people of moderate means.

ROBERT M. VILES*

81. LAWYERS 292.

82. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145 (1958).

83. See E. & J. Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 GEO. WASH. L. REV. 547 (1970); Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

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